

#### § 331.4

Where the permit decision being appealed was made by the division engineer or higher authority, a Corps official at least one level higher than the decision-maker shall make the decision on the merits of the RFA, and this Corps official shall appoint a qualified individual as the RO to conduct the appeal process.

(b) *General.* (1) *Independence.* The RO will not perform, or have been involved with, the preparation, review, or decision-making of the action being appealed. The RO will be independent and impartial in reviewing any appeal, and when assisting the division engineer to make a decision on the merits of the appeal.

(2) *Review.* The RO will conduct an independent review of the administrative record to address the reasons for the appeal cited by the applicant in the RFA. In addition, to the extent that it is practicable and feasible, the RO will also conduct an independent review of the administrative record to verify that the record provides an adequate and reasonable basis supporting the district engineer's decision, that facts or analysis essential to the district engineer's decision have not been omitted from the administrative record, and that all relevant requirements of law, regulations, and officially-promulgated Corps policy guidance have been satisfied. Should the RO require expert advice regarding any subject, he may seek such advice from any employee of the Corps or of another Federal or state agency, or from any recognized expert, so long as that person had not been previously involved in the action under review.

#### §331.4 Notification of appealable actions.

Affected parties will be notified in writing of a Corps decision on an appealable action. For permit denials, the notification must include a copy of the decision document for the permit application, an NAP fact sheet and an RFA form. For proffered individual permits, when the initial proffered permit is sent to the applicant, the notification must include an NAO fact sheet. For declined permits (*i.e.*, proffered individual permits that the applicant refuses to accept and sends back to the

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Corps), the notification must include an NAP fact sheet and an RFA form. Additionally, an affected party has the right to obtain a copy of the administrative record.

#### §331.5 Criteria.

(a) *Criteria for Appeal.* (1) *Submission of RFA.* The appellant must submit a completed RFA (as defined at §331.2) to the appropriate division office in order to appeal a permit denial, or a declined individual permit. An individual permit that has been signed by the applicant, and subsequently unilaterally modified by the district engineer pursuant to 33 CFR 325.7, may be appealed under this process, provided that the applicant has not started work in waters of the United States authorized by the permit. The RFA must be received by the division engineer within 60 days of the date of the NAP.

(2) *Reasons for appeal.* The reason(s) for requesting an appeal of a permit denial, or a declined individual permit, must be specifically stated in the RFA, and must be more than a simple request for appeal because the affected party did not like the permit decision, or the permit conditions. Examples of reasons for appeals include, but are not limited to, the following: a procedural error, an incorrect application of law, regulation or officially-promulgated policy, omission of material fact, incorrect application of the Section 404(b)(1) Guidelines, or use of incorrect data.

(b) *Actions not appealable.* An action or decision is not subject to an administrative appeal under these regulations if it falls into one or more of the following categories:

(1) An individual permit decision (including a letter of permission or an individual permit with special conditions), where the permit has been accepted and signed by the permittee. By signing the permit, the applicant waives all right to appeal the terms and conditions of the permit, unless the authorized work has not started in waters of the United States, and that issued permit is subsequently modified by the district engineer pursuant to 33 CFR 325.7;